IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

No. WD65790

IN THE INTEREST OF B.T.

APPELLANT'S BRIEF

MILLER LAW FIRM, P.C.

Jenifer W. Svancara MO #51842
Danne W. Webb MO #39384
4310 Madison Avenue
Kansas City, Missouri 64111
jsvancara@mlfkc.com
Telephone: (816) 531-0755
Facsimile: (816) 561-6361

COURT APPOINTED ATTORNEY
FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

This action is one involving the constitutionality of R.S.Mo. § 210.117 in that the statute precludes a parent from ever reuniting with a child or having the child placed in the parent's home if that parent has pled guilty to an out-of-state offense that would constitute a felony under Chapters 566 or 568 of the Missouri Revised Statutes. Since the constitutionality of a state statute is at issue, the Missouri Supreme Court has exclusive jurisdiction pursuant to Article V, Section 3, of the Missouri Constitution. A motion to transfer this matter to the Missouri Supreme Court pursuant to Article V, Section 11, of the Missouri Constitution has been filed contemporaneously herewith.

STATEMENT OF FACTS

B.T. ("daughter") was born on April 6, 1990. (Tr. 29:3-5). Shortly after daughter was born, T.E. ("father") was pled guilty to the crime of "Injury to a Child" under Texas law. (Tr. 29:6-9. Thereafter, father served a ten-year sentence for the crime, and was released in December 2002. (Tr. 29:12-19). Shortly after being released from prison, father regained custody of his daughter, and moved her here to Kansas City. (Tr. 29:30 – 30:1).

On March 31, 2005, over fourteen years after father's guilty plea, the Juvenile Officer of Jackson County, Missouri filed a petition alleging, as it relates to father, that father physically abused daughter. (L.F., pp. 1-2). The petition was later amended to add two additional counts against father alleging 1) that father was unable to care for daughter due to his schizophrenia and 2) sexual abuse of the daughter by father. (L.F., pp. 13-16).

On May 24, 2005, the court held a hearing regarding the allegations of the amended petition, whereby the Court found that the evidence adduced sustained the allegations. (L.F. pp. 29-31). The Court then continued the cause until June 28, 2005, for further evidence on disposition. *Id.* At the June 28, 2005, hearing, the Division of Family Services social worker testified that the goal of the permanency plan was reunification of the daughter and father. (Tr. 12:21-13:7). In order for reunification to occur, however, the father would need to have visitation with daughter. (Tr. 13:8-11). The social worker also testified that father had agreed to work with the Children's Division, the Family Court, and with all professionals involved with the Children's Division. (Tr. 12:7-20). At the same hearing, and contrary to the Division's plan of

reunification, the Guardian Ad Litem argued to the Court that father had been previously convicted of a crime involving a child that would be considered a felony under Missouri law, and therefore, pursuant to R.S.Mo. § 210.117, father was precluded from ever having custody of daughter. (Tr. 21:20 – 22:10; 31:18 – 31:19-24).

Following the June 28, 2005, hearing, the Court found that Father had "been convicted of a crime involving a child who is the subject of [the] proceeding, which such offense would be a felony under chapter 568, and is therefore precluded from having a child placed in his care pursuant to Section 210.117 R.S.Mo." (L.F., pp. 36-40). The Court did not make any findings as to father's fitness to currently parent his daughter at that time. *Id.*

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN FINDING THAT FATHER WAS STATUTORILY PRECLUDED FROM EVER REGAINING CUSTODY OF HIS DAUGHTER PURSUANT TO R.S.MO. § 210.117 BECAUSE THE STATUTE VIOLATES THE FOURTEENTH AMENDMENT BY INFRINGING UPON FATHER'S FUNDAMENTAL RIGHT TO GOVERN THE CARE, CUSTODY AND CONTROL OF HIS DAUGHTER, IN THAT THE STATUTE CREATES AN IRREBUTTABLE PRESUMPTION THAT FATHER IS AN UNFIT PARENT WITHOUT ANY CONSIDERATION FOR FATHER'S CURRENT ABILITY TO PARENT THE CHILD.

a. The right to make decisions concerning the care, custody, and control of one's children is a fundamental liberty protected by the Fourteenth Amendment, and subject to strict scrutiny analysis.

Principal Authorities:

Cases:

In the Interest of P.D., 144 S.W.3d 907 (Mo. Ct. App. 2004)

Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000)

Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997)

b. Missouri statute § 210.117 is overinclusive, fails to utilize the least restrictive means, and creates an unconstitutional irrebuttable presumption that all persons convicted of a crime involving a child are unfit parents, regardless of the parent's present ability to parent, and therefore does not pass strict scrutiny.

Principal Authorities:

Cases:

Stanley v. Illinois, 405 U.S. 246, 92 S.Ct. 1208 (1972)

In re E.L.M., 126 S.W.3d 488, 495 (Mo. App. W.D. 2004)

In re K.A.W., 133 S.W.3d 1, 12 (Mo. 2004)

Statutes:

R.S.Mo. §210.117

R.S.Mo. §211.447

STANDARD OF REVIEW

The Supreme Court of Missouri determines issues of law such as the Constitutionality of Missouri statutes *de novo*. *Kirkwood Glass Co., Inc. v. Dir. Of Revenue*, 166 S.W.3d 583 (Mo. 2005). As explained more fully below, the question involved in this appeal implicates a fundamental liberty interest which is accorded strict scrutiny review.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT FATHER WAS STATUTORILY PRECLUDED FROM EVER REGAINING CUSTODY OF HIS DAUGHTER PURSUANT TO R.S.MO. § 210.117 BECAUSE THE STATUTE VIOLATES THE FOURTEENTH AMENDMENT BY INFRINGING UPON FATHER'S FUNDAMENTAL RIGHT TO GOVERN THE CARE, CUSTODY AND CONTROL OF HIS DAUGHTER, IN THAT THE STATUTE CREATES AN IRREBUTTABLE PRESUMPTION THAT FATHER IS AN UNFIT PARENT WITHOUT ANY CONSIDERATION FOR FATHER'S CURRENT ABILITY TO PARENT THE CHILD.

a. The right to make decisions concerning the care, custody, and control of one's children is a fundamental liberty protected by the Fourteenth Amendment, and subject to strict scrutiny analysis.

Personal choices regarding matters of marriage and family life are among the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Cleveland Board of Education v. Cohen*, 414 U.S. 632, 94 S.Ct. 791 (1974). This protected right includes the "right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child." *Id.* The Due Process Clause also has substantive safeguards that protect citizens from governmental interferences that restrict certain fundamental rights and liberties. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000).

The Supreme Court uses a two-part analysis to determine if an interest asserted by a litigant reaches the level of a fundamental liberty interest that is protected by the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997). First, the Court determines whether the asserted interest is objectively so embedded in American tradition and inherent in our notions of ordered liberty that justice and liberty could not exist without it. *Id.* at 720-21. Second, the claimant must carefully describe the infringed right in a way that accurately describes the core fundamental liberty. *Id.* at 721. Some of the interests that have risen to the level of a fundamental liberty interest include the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110 (1942); to preserve bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952); to maintain marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965); to get married, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967); to use birth control, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972); and to have an abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992). The list of fundamental liberties, however, is not infinite. Rather, the Supreme Court looks to our "nation's history, legal traditions, and practices" as guides when defining our substantive due process rights. *Washington*, 521 U.S. at 721.

The liberty interest protected by the Fourteenth Amendment includes the right of parents to "establish a home and bring up children" and "to control the education of their own," *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923); "to direct the upbringing and education of children under their control" and to nurture and direct the child's destiny and to prepare the child for additional obligations, *Pierce v. Society of Sisters*, 268 U.S.

510, 45 S.Ct. 571 (1925); and that the custody, care and nurturing of a child resides first in the parents "whose primary function and freedom includes preparation for obligations that the state can neither supply nor hinder," *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944). *See also Stanley v. Illinois*, 405 U.S. 246, 92 S.Ct. 1208 (1972); *Wisconsin v. Yoder*, 406 U.S. 584, 92 S.Ct. 1526 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549 (1978); and *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493 (1982).

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel*, 530 U.S. at 65. Consistent therewith, Missouri courts have held that "the bond between a parent and child is a fundamental societal relationship. A parent's right to raise [his] children is a fundamental liberty interest protected by the constitutional guarantee of due process. It is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. The fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the state." *In the Interest of P.D.*, 144 S.W.3d 907 (Mo. Ct. App. 2004); *see also In the Interest of S.M.H.* 170 S.W.2d 524, 530 (Mo. Ct. App. 2005); *In the Interest of Hill*, 937 S.W.2d 384, 386 (Mo. Ct. App. 1997); *In the Interest of M.D.R.*, 124 S.W.3d 469 (Mo. 2004).

Through this extensive line of precedent, the Supreme Court of the United States and the Missouri Courts have time and again held that the Due Process Clause of the Fourteenth Amendment constitutionally protects the fundamental right of a parent to

govern the care, custody, and control of his or her children. These courts have further held that Due Process mandates that any governmental infringement upon this liberty interest must pass strict scrutiny. *Troxel* at 80 (Thomas, C., concurring). As such, the governmental action must be narrowly tailored to serve a compelling state interest. *Washington*, 521 U.S. at 721; *see also Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439 (1993); *Washington*, 521 U.S. at 721 (the government may not infringe upon these fundamental liberties at all, "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Grutter v. Bolinger*, 539 U.S. 306, 327, 123 S.Ct. 2325 (2003) (strict scrutiny demands that the government show that an individual's liberty was restricted to serve a compelling state interest). Further, the governmental action must be narrowly tailored to serve the compelling state interest through the least restrictive means. *Id.*

b. Missouri statute § 210.117 is overinclusive, fails to utilize the least restrictive means, and creates an unconstitutional irrebuttable presumption that all persons convicted of a crime involving a child are unfit parents, regardless of the parent's present ability to parent, and therefore does not pass strict scrutiny.

Missouri Revised Statute § 210.117 infringes upon the constitutionally protected right to make decisions concerning the care, custody, and control of one's children. Since the statute implicates a fundamental liberty protected by Due Process, the law must serve a compelling state interest through least restrictive means in order to pass strict scrutiny.

The statute provides that when the state takes custody of a child, it may not later reunite that child with a parent who has been found guilty of or who has pled guilty to one of numerous felonies codified in Chapters 566 and 568 of the Missouri Code. R.S.Mo. § 210.117(1) (2005). Additionally, the same blanket prohibition against reunification applies if the parent committed an offense in another state that resembles an offense codified in either Chapters 566 or 568. R.S.Mo. § 210.117(2). Because the plain language of the statute explicitly mandates that, under certain conditions, a parent can never regain custody of his or her child, the statute facially infringes upon the parent's fundamental liberty interest concerning the care, custody and control of his or her children. As such, the state must prove that § 210.117 serves a compelling interest through narrowly tailored means. *Reno v. Flores*, 507 US at 302. The state cannot meet its burden. Additionally, because the statute creates an irrebuttable presumption that certain parents are unfit, it denies those people fair procedural due process by not affording them the opportunity to show that conditions making them unfit in the past no longer exist. Therefore, the statute is unconstitutional as written because it creates an irrebuttable presumption that denies both procedural and substantive due process.

Statutes that create permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fourteenth Amendment. *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct 2230 (1973). The United States Supreme Court has routinely held that if the government presumes facts against a person that he or she is not qualified for some important benefit or fundamental right, the irrebuttable presumption may be unconstitutional. *Id. See also Cleveland, supra*, 414 U.S. 632, 94 S.Ct. 791

(1974) (a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing to teach is unconstitutional); *Vlandis, supra*, 412 U.S. 441, 93 S.Ct. 2230 (1973) (a Connecticut statute mandating an irrebuttable presumption of nonresidency for the purposes of determining if a student qualified for reduced tuition rates at a state university was unconstitutional); and *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358 (1932) (an irrebuttable presumption that gifts made within two years prior to the donor's death were made in contemplation of death and subject to estate tax was so arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law. The court stated that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment").

The case most analogous to the present appeal is *Stanley v. Illinois*, 92 S.Ct. 1208 (1972)[1]. In *Stanley*, the children of an unwed father were declared wards of the state and placed with court-appointed guardians upon the death of mother. Father appealed, arguing that he had never been shown to be an unfit parent. Rather, all that was shown was that he and mother were not married. Under the Illinois statute, this fact, alone, precluded father from having custody of his children, and father's fitness as a parent was irrelevant. Prior to mother's death, father had lived with mother, provided financial

[1] *Stanley* was decided upon Equal Protection grounds. Admittedly, the cases are inconsistent as to whether the protection the appellant is relying upon is based upon Equal Protection or Due Process. Each case, however, has reached the same result that irrebuttable presumptions affecting a person's fundamental rights are unconstitutional.

support to the children, and in all ways cared for the children. Despite all of this, the state removed the children because, under Illinois statute, unwed fathers were presumed unfit to raise their children. The Supreme Court held that father "was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending [a hearing] to all other parents whose custody of their children is challenged, the state denied [father] the equal protection of the laws guaranteed by the Fourteenth Amendment." The court recognized that any delay in the court's action would only serve to deprive the father of his children and cause the children to suffer from uncertainty and dislocation. The Court focused on whether the state had done anything to prove that father was currently fit to parent his children. The state had done nothing, and simply relied upon the presumption created by Illinois statute. The Court stated:

> "[p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

Id. at 656-57; *see also Cleveland*, *supra*, (the court conceded that the regulations did attempt to achieve a laudable goal, however, that statute in question was too broad, and failed to allow for individualized determination).

The foregoing case law shows that the Supreme Court views irrebuttable presumptions that infringe upon fundamental liberties as generally being unconstitutional.

In Missouri, the Supreme Court has acknowledged that, "statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship. *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004). The statute in Missouri providing grounds for terminating a parent's rights is stated in R.S.Mo. § 211.447. The Missouri Supreme Court's jurisprudence concerning R.S.Mo. § 211.447 is an example of the Court's distaste for irrebuttable presumptions that restrict parental rights. This statute permits a prior judgment terminating a parent's rights in one case to serve as the basis to terminate the parent's rights in other cases as long as the same criteria are present that caused the prior termination. *In re E.L.M.*, 126 S.W.3d 488, 495 (Mo. App. W.D. 2004) (citing R.S.Mo. § 210.117.1 (1978)). Moreover, when reviewing § 211.447, the Court stated that it could not terminate a parent's rights pursuant to this statute based on prior acts alone. *In re K.A.W.*, 133 S.W.3d at 9. The Court went on to state that "there must be some explicit consideration of whether the past acts provide an indication of the likelihood of future harm." *Id. at* 10. In other words, under § 211.447, although a presumption initially exists, a parent is able to provide evidence to rebut the presumption of unfitness.

R.S.Mo. § 210.117 is similar to § 211.447 in that they both rest between two divergent interests. They seek to accomplish certain state objectives relating to the care and custody of minors at the expense of other constitutionally protected fundamental rights held by parents. *See* R.S.Mo. §§ 211.447, 210.117. In so doing, both statutes

create a legal presumption that the parent is unfit based upon his or her prior acts. *See In re E.L.M*, 126 S.W.3d at 495. The same opportunity to rebut the presumption of unfitness that is present under § 211.447, however, does not exist under § 210.117.

Section 210.117 effectively revokes the rights of any parent who has ever committed an act of abuse anywhere in the country at any time without allowing the parent the opportunity to prove that he or she is now fit or that the circumstances that resulted in the prior conviction no longer exist. R.S.Mo. § 210.117. The only burden that the state must meet in order to permanently revoke a parent's custody is to produce evidence of a conviction, guilty plea, or plea of *nolo contendre* to a Chapter 566, 568, or equivalent foreign offense. R.S.Mo. § 210.117. If the state can prove that such an event occurred at any time in the past, the parent is deemed forever unfit. The inability to rebut the presumption of unfitness is, therefore, contrary to both federal and state custody law and cannot pass strict scrutiny because it revokes the parent's fundamental right to make decisions concerning the care, custody and control of the child in what is actually the most, not least, restrictive means.

In the present action T.E. ("father") was convicted of "Injury to a Child" under Texas statute over 14 years ago. As a result, father was sentenced to ten years in the Texas Correctional Institution. Father served his time, and upon release, regained custody of B.T. ("daughter"). Father and daughter moved to Kansas City, where he made a good home for the two of them.

Daughter was brought under the custody of the State of Missouri due to allegations of physical and sexual abuse of daughter by father. Father at all times has

denied those allegations, and continues to deny them. A hearing was held where the court found that sufficient evidence existed to keep daughter in the custody of the State. Thereafter, the Court held a disposition hearing, wherein the social worker testified that the goal of the permanency plan was reunification of daughter with father. The Guardian Ad Litem, however, argued to the Court that father had been previously convicted of a crime involving a child that would be considered a felony under Missouri law, and therefore, pursuant to R.S.Mo. § 210.117, father was precluded from ever having custody of daughter.

At the hearing, the social worker testified that it was the goal of the Division of Family Services to reunify father with daughter. In fact, the social worker testified that father had agreed to work with the Children's Division, the Family Court, and with all professionals involved with the Children's Division in order to get his daughter back. The social worker further testified that in order for the Division to take steps toward reunification of father and daughter, the father would need to have some sort of visitation or contact with daughter. This contact is in direct conflict with R.S.Mo. § 210.117. In other words, the only way father can be reunified with daughter is by proving himself capable through visitation and contact which, pursuant to R.S.Mo. § 210.117, has been prohibited. The court below, constrained by the statute, found that pursuant to R.S.Mo. § 210.117, father could never again have custody of daughter. The court below did not make any findings regarding father's current fitness to parent daughter.

The facts of this case are a perfect example of the over-inclusiveness of § 210.117. Although the Child's Division and the social worker desired to work towards

reunification, father was statutorily precluded from doing so without any opportunity to prove his fitness. Both as written and applied, § 210.117 stands in strict opposition to both U.S. Supreme Court and Missouri Supreme Court precedent on termination of parental rights. Section 210.117 allows for revocation of parental rights based on past acts alone, and it does not permit a court to consider whether those past acts indicate a likelihood of future harm. Nor does the statute permit the parent to rebut the presumption of unfitness or show that the conditions existing in the past no longer exist. Unlike § 211.447, which favors the parent-child relationship in a manner that passes the Court's strict scrutiny test, § 210.117 creates a presumption in favor of termination that unconstitutionally revokes a parent's fundamental due process liberties and restricts procedural due process by denying the parent an opportunity to rebut state's evidence. For all the foregoing reasons, § 210.117 is unconstitutional as written.

CONCLUSION

WHEREFORE, for the foregoing reasons, father respectfully requests that this Court find that Missouri Statute § 210.117 is unconstitutional and should, therefore, be overturned.

Respectfully submitted,

MILLER LAW FIRM, P.C.

Jenifer W. Svancara MO #51842
Danne W. Webb MO #39384
4310 Madison Avenue
Kansas City, MO 64111
Telephone: 816-531-0755
Telefax: 816-561-6361
COURT APPOINTED ATTORNEYS FOR FATHER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was sent via U. S. Mail this 2nd day of November, 2005, to:

Office of Guardian ad Litem
Scott Forrester
GUARDIAN AD LITEM FOR JUVENILE
625 E. 26th
KCMO 64108

Natalie Buckley
MBCH CHILDREN AND FAMILY MINISTRIES
4001 NE Lakewood Way
Lee's Summit, Missouri 64064

Jennifer Cicero
ATTORNEY FOR JUVENILE OFFICER
625 E. 26th
KCMO 64108

Diane Watkins
ATTORNEY FOR MOTHER YOLANDA THOMAS
Wagstaff & Cartmell, LLP
4740 Grand, Ste. 300
KCMO 64112

_____
Attorney for Father

CERTIFICATE OF COMPLIANCE

I certify that the above and foregoing Brief of Appellant complies with the limitations contained in Rule 84.06 (b)(1) of the Missouri Rules of Civil Procedure, in that the Brief of Appellant has 4,561 words and the diskette has been scanned for viruses and is virus free.

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Attorney for Appellant

APPENDIX TO APPELLANT'S BRIEF
INDEX

Document Description **Page No.**